80-1989

Office-Supreme Court, U.S.
FILED
MAY 28 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

NO. _____

ROBERT W. FULLERTON

Petitioner,

VS.

STATE OF ARKANSAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

WILLIAM C. McARTHUR
McARTHUR & LASSITER, P.A.
Attorneys at Law
2020 Broadway
Little Rock, Arkansas 72206
(501) 376-6173

Attorneys for Petitioner

QUESTION PRESENTED

Whether judicial determinations by a U.S. District Court in a civil trial and a Municipal court are binding upon the Trial Court and whether the Trial Court's failure to exclude the decided issues constitutes former jeopardy in violation of the Fifth Amendment of the United States Constitution.

INDEX

Page

I. Question Presented.....Index

II. Opinion Below.....1

III. Jurisdiction.....2

IV. Constitutional Provision Involved.....2

V. Statement Of The Case.....3

VI. Reasons For Granting The Writ.....4

A. The judgment below is in violation of the Constitution of the United States.....4

VII. Conclusion.....8

Appendix A.....9

CITATIONS

Page

CASES:

In Re: Piper Aircraft Distribution System, 551 F.2d 213 (1977 8th Cir.).....4

Ashe v. Swenson, 397 U.S. 436 (1970).....5

Humphries v. Wainwright, 584 F.2d 702 (1978 5th Cir.).....6

Illinois v. Vitale, 447 U.S. 410 (1980).....6

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the Constitution of the United States.....2

STATUTES:

Ark. Stat. Ann. 41-1504.....5

28 U.S.C. 1357 (3).....2

IN THE

Supreme Court Of The United States

NO. _____

ROBERT W. FULLERTON

Petitioner,

VS.

STATE OF ARKANSAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Robert W. Fullerton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in the proceeding February 25, 1981.

I. OPINION BELOW

The opinion of the Arkansas Court of Appeals is not disignated for publication and is attached as Appendix A. The record of Petitioner's pretrial hearings and his trial held June 5 and 6, 1980, is attached as Appendix B.

II. JURISDICTION

The opinion of the Arkansas Court of Appeals was entered February 25, 1981. Petitioner's Petition for Rehearing was denied on March 26, 1981. This Petition for Writ of Certiorari was filed within sixty days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1357(3).

III. CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IV. STATEMENT OF THE CASE

Petitioner was involved in an automobile accident on April 1, 1978. In the accident a young man was fatally injured and Petitioner was grievously injured. Because of the smell of alcohol and the circumstances of the accident, Petitioner was charged with manslaughter, driving under the influence of alcohol and refusing to submit to a breathalyzer. The Municipal Court of Hot Springs, Arkansas heard all cases on or about June 23, 1978. The manslaughter charge was certified to the Circuit Court and a Nolle Prosequi was entered on the DWI and the other charge. A civil tort action was subsequently filed by the widow of the deceased against Petitioner seeking actual and punitive damages. On March 27 and 28, 1980, the civil trial was conducted in the United States District Court, Western District of Arkansas and upon conclusion of the testimony, the Trial Judge Honorable Oren Harris, directed a verdict for Petitioner denying punitive damages ruling there to be insufficient proof of "willful and wanton" misconduct.

Prior to trial on the manslaughter charge, Petitioner moved for dismissal of the charge due to the District Court's ruling and "In Limine" on any testimony regarding driving under the influence of alcohol due to the actions of the municipal court regarding the intoxication charge. Both motions were denied and Petitioner was tried and convicted before a jury in Garland County Circuit Court.

On appeal, the Arkansas Court of Appeals affirmed ruling that the prior decisions were not res judicata or collateral estoppel and did not amount to former jeopardy.

V. RESONS FOR GRANTING THE WRIT

A. THE JUDGMENT BELOW IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner appeared before the Garland County Circuit Court on the charge of manslaughter on June 5, and 6th, 1980. Pre-trial motioms had been filed and were heard on June 5, 1980 seeking to have the charge dismissed and certain testimony excluded. The basis for these motions was that the United States District Court in a civil trial with Petitioner as a defendant and evolving from the automobile accident from which these charges resulted, had ruled that there was insufficient evidence of "reckless and wanton" actions on the part of defendant and the District Court directed a verdict against punitive damages and the Municipal Court of Hot Springs, Arkansas had heard evidence on a preliminary hearing on the charge of manslaughter and evidence of two misdemeanor charges including driving while under the influence of intoxicants and upon conclusion of the testimony, the Municipal Court entered a Nolle Prosequi of the driving while under the influence charge. Petitioner maintained in the Trial Court as here that these prior judicial determinations barred his prosecution for the charge of manslaughter and barred any testimony relating to intoxication or consumption of alcoholic beverages These motions were denied by the Trial Court and Petitioner was convicted. The Arkansas Court of Appeals affirmed the conviction.

Collateral Estoppel is described as having four essential elements in the case of *In Re: Piper Aircraft Distribution System*, 551 F.2d 213 (1977 8th Cir.). These essential elements are: one, identical issue; two, actual litigation; three, valid and final judgment; and four,

determination of the issue. In the civil case decided by the Federal District Court, the Plaintiff was the widow of the victim alleged in the manslaughter charge. Ark. Stat. Ann. 41-1504 states in its pertinent parts: A person commits manslaughter if: (c) he recklessly causes the death of another person; The requirement for the granting of punitive damages is proof of reckless and wanton misconduct and that standard of proof was the basis for the determination by the United States District Court. The United States District Judge ruled upon hearing all testimony that there was insufficient proof of reckless and wanton conduct and directed a verdict in favor of the petitioner in the civil litigation. This issue is identical with the key issue of the charge of manslaughter that is reckless behavior. The four elements of collateral estoppel are clearly met by the determination by the United States District Court. There has been some argument that a civil determination should not bar a criminal prosecution but in *Ashe v. Swenson*, 397 U.S. 436 (1970) the Court held that claim of collateral estoppel is not barred in a criminal case because of a lack of mutuality since almost by definition, the parties, except for the defendant, cannot be the same. This Court ruled that the State's not being a party to the prior civil litigation does not prevent collateral estoppel from preventing the prosecution of a defendant. The second prior judicial determination involved a hearing in the Hot Springs Municipal Court in which Petitioner was charged with manslaughter, driving while under the influence and another misdemeanor offense. Upon hearing all the testimony, the Municipal Court certified the felony charge of manslaughter to Circuit Court and entered a Nolle Prosequi on its docket for all misdemeanor offenses. Despite this ruling, the trial court allowed testimony to be presented by the State regarding intoxication as the key testimony in the prosecution. There was little or no other

evidence relating to reckless behavior by Petitioner. The Trial Court in no way limited the State's testimony regarding intoxication. In *Humphries v. Wainwright*, 584 F.2d 702 (1978 5th Cir.) an almost identical situation was considered by the Court with exception that the manslaughter or negligent homicide charge specifically referred to driving under the influence. The Court ruled that the Nolle Prosequi of the misdemeanor charge of driving while intoxicated was equivalent to an acquittal. Petitioner maintains that the same is true in this case since the Municipal Court had jurisdiction of the misdemeanor charge and heard testimony thereon.

Petitioner maintains that the two prior judicial determinations acted as a bar to the charge of upon which he was convicted through collateral estoppel which amounted to twice being placed in jeopardy. *Humphries v. Wainwright* and *Ashe v. Swenson, supra*, both have ruled that the principle of collateral estoppel is embodied in the Fifth Amendment guaranteed against double jeopardy. These decisions clearly support the view of petitioner that the decision by the United States District Court and the municipal Court collaterally estopped the State from proceeding with this charge since the key elements of the charge had already been decided by courts of competent jurisdiction. In *Illinois v. Vitale*, 447 U.S. 410, (1980), it was ruled that the double jeopardy clause did not prohibit the prosecution for involuntary manslaughter because of an acquittal of the defendant on the charge of failure to reduce speed to avoid an accident. Petitioner maintains that this case is distinguishable from the present case in that in the *Vitale*, the Court ruled that unless the charge of manslaughter always included the offense of failure to reduce speed, then double jeopardy would not apply. In this case, the charge of manslaughter always requires reckless

behavior and the U.S. District Court and Municipal Court in their combined decisions determined the issues of recklessness. Perhaps the Municipal Court decision concerning driving while under the influence alone would not constitute a complete bar to the prosecution on manslaughter, but the two decisions together do totally determine the issue of recklessness and thereby distinguish this case from *Vitale*, decision.

VII. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM C. McARTHUR
McARTHUR & LASSITER, P.A.
Attorneys at Law
2020 Broadway
Little Rock, Arkansas 72206
(501) 376-6173

Attorneys for Petitioner

APPENDIX A

ARKANSAS COURT OF APPEALS

No. CA CR 80-62

Opinion Delivered February 25, 1981

ROBERT W. FULLERTON	
APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT
V.	COURT
STATE OF ARKANSAS	HON. HENRY M. BRITT, JUDGE
APPELLEE	AFFIRMED

GEORGE K. CRACRAFT, Judge

On the evening of March 1, 1978, one Mike Morris, accompanied by his wife and their seven year old son, was driving their automobile west between Little Rock and Hot Springs. As they approached the outskirts of Hot Springs an eastbound vehicle driven by the appellant went out of control on the shoulder of the highway, crossed the roadway, and collided head-on with the Morris vehicle. Mike Morris died as a result of injuries received in that accident.

Appellant was charged with manslaughter under Ark. Stat. Ann. §41-1504 (Repl. 1977), on information alleging that he had recklessly caused the death of the decedent. On the 6th day of June, 1980, appellant was found guilty by the jury, and sentenced to two years imprisonment. Appellant

brings this appeal from the jury's verdict and the order of the court entered thereon, alleging nine points of error. We find no error and affirm the decision of the lower court. The points of error brought forward by the appellant will be taken up separately in this opinion.

The appellant argues that the evidence is insufficient to support the verdict rendered herein. The deceased was killed in the accident in which his automobile was hit head-on by a vehicle driven by the appellant. His wife, a passenger in the car, was seriously injured and had no recollection of the events immediately preceding the collision. The only eyewitness to the collision testified that he had been driving behind the Morris vehicle for some period of time before the collision. Both vehicles had been traveling about fifty miles an hour during the period that he was following the Morris car. Shortly before the collision this witness stated that the traffic in the opposite lane was extremely heavy and almost "bumper to bumper." He noticed a car in the on-coming lane of traffic slowing down to make a left-hand turn across the highway into a driveway, cuasing some ten or twelve vehicles to "back up" on the highway. When he first observed the appellant's vehicle, it was on the shoulder of the eastbound lane passing the line of traffic. He proceeded down the shoulder, came back onto the highway out of control, crossed the highway and crashed into the Morris car head-on.

A state trooper testified that he had seen appellant about 6:30 that evening while directing traffic in the City of Hot Springs. The day on which this accident occurred was "Derby Day" and traffic was extremely heavy. His attention was called to appellant by the "squalling" of his tires as he forced his way into the heavy traffic from a parked position. He was stopped and admonished that

unless he could drive better than he had been "he had better go to jail." The trooper testified that he was outside the car and did not detect the odor of alcohol on appellant at that time.

About an hour and a half later the same trooper was called to the scene of the accident from which this action arose. He there saw the appellant and detected the odor of alcohol on his breath and that his speech was slurred. The trooper found yaw marks on the shoulder which measured a distance of one hundred four feet and five inches from point of entry to the south edge of the shoulder and then turned back to the west and extended for an additional thirty-one feet back onto the pavement. He defined the yaw marks as those which are made by a tire "going sideways." He also found marks in the gravel indicating an acceleration and other physical evidence from which he determined that appellant was traveling at a rate of speed in excess of fifty miles per hour which, under the conditions then existing, was excessive. Another state trooper also testified that he detected the odor of alcohol on the appellant. Both troopers testified to other actions and outbursts of the appellant which indicated to them that his actions were affected by alcohol.

On appeal of criminal conviction, we view the evidence in the light most favorable to the state and affirm if there is substantial evidence to support the conviction. *Lunon v. State*, 264 Ark. 188, 569 S.W.2d 663 (1978). Evidence is substantial if it is of sufficient force and character to compel a conclusion with reasonable and material certainty. *Jones v. State*, 269 Ark. 119, S.W.2d 748 (1980). The evidence of intoxication, belligerent attitude, and the observed action of his vehicle traveling on the shoulder passing other vehicles on the right, crossing the road directly into the path of the

Morris vehicle, is sufficient evidence of a conscious disregard of a substantial risk from which the jury could have found that the defendant acted recklessly, and that that recklessness caused the death of Mike Morris.

At about the same time the criminal charges were filed herein, a civil suit was filed in the U.S. District Court against appellant by the widow of the deceased, seeking compensatory and punitive damages for wrongful death based on allegations of willful and wanton misconduct. In that court Judge Oren Harris, at the conclusion of the plaintiff's evidence, dismissed the prayer for punitive damages on ground that there was insufficient evidence to justify submitting the question of willful and wanton misconduct to the jury.

Prior to the trial herein appellant moved for a dismissal of the charge based on a collateral estoppel arising from the order of the United States District Court, asserting that the issue was identical and only the burden of proof differed in the two cases. It was the position of appellant that the ruling in the federal court excluded any further evidence on that issue in this case. We find no merit in this contention.

Ordinarily collateral estoppel can only be effective where the same issues are raised between the same parties to prior litigated matters. The requirement of absolute mutuality has been relaxed in some cases where it appears that while the party sought to be estopped was not a named party to the prior proceeding, its interest was fully represented. In these cases the parties may not be the same in name but in legal effect they are substantially identical. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Davis v. Perryman*, 225 Ark. 963, 286 S.W.2d 844 (1956).

The great weight of authority, and particularly that in the federal courts holds that collateral estoppel of a civil judgment is not applicable in a subsequent criminal prosecution, where the government was not a party and had no full and fair opportunity to litigate the issues sought to be used against it. The test to be applied is whether the party sought to be estopped had a full opportunity to litigate the issue in the prior case. *United States v. Jensen*, 608 F.2d 1347. Other cases reason that the rule cannot apply because not only were the parties different but the weight of evidence and quantum of proof are different.

In *Washington National Ins. Co. v. Clement*, 192 Ark. 371, 91 S.W.2d 265, the court held conversely that a conviction in a criminal prosecution for driving while intoxicated was not conclusive of that issue of fact in a subsequent civil action arising from the same transaction, and hence one prosecuted and convicted of a criminal charge was not thereby estopped from maintaining a civil action and proving therein that he was innocent of the offense for which he was convicted. We hold that the State of Arkansas had no full and fair opportunity to litigate this issue in the United States District Court and is in no way estopped by the rulings in that court.

The record reflects that the appellant was initially charged in the Municipal Court of Hot Springs with both driving while intoxicated and manslaughter. The court there had a preliminary hearing on the manslaughter charge to determine whether or not there was sufficient evidence to hold the appellant for trial in the circuit court. At the conclusion of that hearing the municipal judge found probable cause and bound appellant over for trial in the circuit court on a charge of manslaughter. At that time a nolle prosequi was entered on the charge of driving while

intoxicated. Appellant asserts on this appeal that as there was evidence taken on the charge of driving while intoxicated, the trial in the Circuit Court of Garland County on the charge of manslaughter subjects him to double jeopardy. We cannot agree.

Our courts have held that a person might at the same time commit two offenses and be justly punishable for both and that a conviction or acquittal upon one would have no effect upon the other. In *Campbell v. State*, 215 Ark. 785, 223 S.W.2d 505, the court expressly held that a former conviction of driving while intoxicated does not bar prosecution for a homicide arising from the same act. It was there held that these were different offenses, related not by definition but only by concurrence in time and space, and in such situations double jeopardy rules are inapplicable. In *Guyot v. State*, 222 Ark. 275, 258 S.W.2d 569, the court pointed out that more than one offense can arise from one act and yet be separate offenses for double jeopardy purposes.

Appellant next asserts that the court erred in denying his motion to dismiss the charges due to an unconstitutional delay in the trial. In support of his position appellant cites Ark. Stat. Ann. §43-1709 (Repl. 1977), and Rule 28.2, Rules of Criminal Procedure [Ark. Stat. Ann., Vol. 4A (Repl. 1977)]. The record reflects that the defendant was arrested and charged with the offense on April 3, 1978, and released on bail April 5, 1978. His trial was subsequently set for March 13, 1979. On January 3, 1979, appellant moved for a continuance of the case which was granted. On June 26, 1979, he again filed a motion for continuance which contained an express waiver of speedy trial under both state and federal law. He was tried on June 26, 1979. Rule 28.3, Rules of Criminal Procedure [Ark. Stat. Ann., Vol. 4A

(Repl. 1977)], expressly excludes from computation of the time for trial:

> (c) the period of delay resulting from a continuance granted at the request of the defendant or his counsel.

When the periods resulting from appellant's requests are excluded, the time of delay does not exceed three full terms of the court.

The United States Supreme Court set out in *Barker v. Wingo*, 407 U.S. 514, and the Arkansas Supreme Court adopted in *Curan v. State*, 260 Ark. 461, 541 S.W.2d 923, four factors to be considered in determining whether an accused has been deprived of a speedy trial. The four factors identified by the court are "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Appellee argues and we agree, that less than three terms had passed prior to the time the request for continuance containing an express waiver of his right to a speedy trial was granted. The record is clear that the reason for delay was his own application for continuance based on his desire to press to a conclusion a civil suit pending in the federal courts growing out of this same accident. Defendant at no time asserted his right to earlier trial. It is obvious that he could not request a continuance and demand a right to immediate trial at the same time. Nor does the record indicate any prejudice resulted to appellant by the delay in trial date. We find no merit in this contention.

Appellant further objected to the admission of the evidence of a police officer as to statements, conduct, and sobriety of appellant at the hospital following the accident. This argument is based primarily on the assertion that the

appellant's physical and mental condition at the time made conclusions to be drawn from the officer's perception impossible. While agreeing that the officer could conclude that he smelled an odor of alcohol on the appellant, he questions the officer's ability to rationally reach conclusions from the outburst made by the appellant under the circumstances. These were experienced officers who had investigated many such accidents and certainly their statements with regard to the condition of the man and his sobriety are admissible. The circumstances under which the statements by the appellant were made and the effect of his pain and injury on his outburst go more to the weight of the evidence than to its admissibility.

The appellant further urges that the conviction should be reversed because of certain statements made by the trial judge during the course of the trial. The first remarks were as follows:

BY THE COURT:

Q. Trooper Lloyd, wait a minute before you run off. You taught schol for a while?

A. Yes sir.

Q. Done any preaching?

A. Not much.

Q. Not much but some, is that right?

A. A little bit.

Q. Okay, mainly a choir director?

A. Un-huh.

Q. This was all before you became a member of the Arkansas State Police?

A. Right.

Appellant characterizes these remarks as an "obvious attempt to lend credibility to the witness." We note that no objection was made to the trial court's questioning of this witness and we can see nothing in those questions and answers which would in anywise indicate an intention on the part of the court to add or detract from his credibility.

Appellant urges that prejudicial remarks were made by the trial judge when appellant objected to the court's questioning deceased's widow concerning his background and employment, as follows:

BY THE COURT:

Q. Do you know the name of some of his employers?

A. He was employed in Memphis.

Q. Doing what?

A. In the restaurant, working in a restaurant.

Q. I see. What before then?

MR. GIBBS: Your Honor, for purposes of....

THE COURT: Now, Mr. Gibbs, I have a right to ask a few questions and that is precisely what I am going to do.

MR. GIBBS: Well then, we would like to object, your Honor.

THE COURT: You may object. Your objections are noted and I am going to ask these questions. Now, go back and let me ask the questions I am asking.

MR. GIBBS: Your Honor, we object.

THE COURT: I mean precisely what I say Mr. Gibbs.

MR. GIBBS: To the court asking this witness and we'd like our objections noticed.

THE COURT: Do you hear what I have to say?

MR. GIBBS: Yes sir.

THE COURT: I'm going to proceed.

MR. GIBBS: I have a responsibility to defend this gentleman.

THE COURT: All right.

We find nothing prejudicial to the appellant by these statements by the court. At most it might demonstrate some impatience by the trial court with counsel's continued interruption after the court announced its ruling and had noted the defendant's objection. This does not exhibit the degree of prejudicial partiality that would necessitate reversal. *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969); *Rogers v. State*, 257 Ark. 144, 515 S.W.2d 79.

It is further to be noted that the trial court admonished the jury both in preliminary and closing instructions that no statement, ruling or remark which he had made during the presentation of the testimony was intended to indicate any opinion that he might have as to the facts. We find this contention to be without merit.

There were introduced into evidence a series of photographs of the deceased, taken by the coroner at the time of his examination. The photographs were of the head, body and limbs. Appellant asserts that the trial court erred in allowing the introduction of these photographs as they were not relevant to any issue in the trial and they were inflammatory and prejudicial. In *Prunty v. State*, 271 Ark. 77 (Ark. App. 1980), a similar objection was raised in a trial for manslaughter. The trial judge overruled the objection on the grounds that they were the best evidence of a part of what had happened at the scene, and had probative value on the issue of speed and force of impact. On appeal the court affirmed, holding that even inflammatory photographs are admissible in the sound discretion of the trial judge, if they tend to shed light on any issue, or are useful to enable the witness to better describe the objects portrayed or the jury to better understand the testimony. Whether or not the court should admit a photograph depends on whether the asserted inflammatory nature is outweighed by its probative value; and neither is it rendered inadmissible merely because it is cumulative or unnecessary due to admitted or other facts proved. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938.

In the case now before the court these photographs were relevant as to these same elements and purpose. They corroborated the testimony of the coroner as to the extent of the injuries and to the cause of death, and although speed was not as great as in the *Prunty* case there was substantial evidence to the excessive speed under the circumstances.

During the examination of the deceased by the coroner a routine test was made for the purpose of determining whether the deceased had alcohol in his blood. The trial court excluded evidence of the result of that test on the

grounds that it was irrelevant. Appellant contends that the test results should have been admitted for two purposes: (1) to impeach the credibility of the widow's testimony that she had not observed her husband drinking on the day of the accident; and (2) that he was not intoxicated.

The test results, if admitted, would have shown a minimal alcohol content. Mrs. Morris's testimony was that she had not observed her husband drinking and that he was not intoxicated. The results of the test would be no indication that she had in fact observed him drinking, or that her belief that he was not intoxicated was false. The appellant concedes that there was no testimony whatever that the victim's conduct contributed in any way to the accident. Thus the test results were irrelevant to any issue. We find no merit to this contention.

During the trial the appellant called a witness who lived near the scene of the collision and had walked down within a hundred yards of the accident. She testified that she was engaged in a conversation with an unidentified person who parked his car a short way from her driveway. She made a proffer of proof as to her conversations with this unknown person, which on proper objection were ordered striken from the record and excluded as irrelevant hearsay. The excluded portion of her testimony was that she addressed the question to the gentleman as to whether or not he was hurt and his response was "no." She also asked him where the other vehicles were, and he responded by "pointing in the direction toward Little Rock." She next asked him if he had been involved in a wreck and he responded "yes." She asked him if his car was damaged and he responded "yes." There is no question that these responses were hearsay. The witness did not see any damage to the vehicle despite the fact that it was a clear

night and the car's lights were such as to have enabled her to see the damage if it existed.

Appellant asserts that the testimony should have been admitted as an excited utterance. An excited utterance is defined in Rule 803, Uniform Rules of Evidence, [Ark. Stat. Ann. Vol. 3A (Repl. 1979)], as follows:

> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitment caused by the event or condition.

Before such an utterance may be repeated as an exception to the hearsay rule the proponent of such evidence has a burden of establishing facts which qualify such a statement as admissible under the exception. The foundation facts must demonstrate (1) that there was a startling event or condition, and (2) that the statement was the product of the declarant's stress or excitment resulting from the startling event or condition. It must also be shown that the utterance was prompted by that startling event and was not the product of reflection and thought. It must be made under such circumstances which preclude any presumption that it was the result of deliberation.

The testimony of this witness was that she heard the sound of the collision while in her home and had walked down some fifty yards to the edge of the highway where she encountered the unidentified person. There was no evidence of any stress or of his physical or emotional condition at the time the statements were made or that the statements were uttered in any excited manner. Nor does it appear that the utterances were spontaneous. These statements were answers given to direct inquiries elicited

by this witness. His answers were the product of reflective thought. Nor was there any evidence indicating that this vehicle was actually involved in the accident, or that this vehicle in any way contributed to it. It was, therefore, irrelevant to the existence of any fact in issue and was not admissible. We find no error in the trial court's ruling.

We affirm.

Fogleman, Special Judge, joins in this opinion.

Corbin, J., not participating.